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FIRST GENERAL COUNSEL'S REPORT

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DATE RECEIVED: May 30, 2013

DATE ACTIVATED: September 17, 2013

EXPIRATION OF SOL: 2-15-16 (earliest)

3-16-18 (latest)

ELECTION CYCLES: 2012 / 2014

COMPLAINANT: Brad Miller for United States Congress

RESPONDENT: Jonathan W. Broyhill

RELEVANT STATUTES: 2 U.S.C. § 439a(b)
11 C.F.R. § 113.1(g)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint in this matter alleges that Jonathan W. Broyhill made a total of approximately \$58,000 of unauthorized disbursements while serving as bookkeeper to Brad Miller for United States Congress and John R. Wallace in his official capacity as treasurer (the "Committee"). The Committee filed with the Commission and a supplemental *sua sponte* Submission that included the Complaint¹ against Broyhill concerning the Committee's reporting irregularities as a result of Broyhill's alleged embezzlement.

¹ The Committee supplemented the Submission on May 30, 2013 ("Supplemental Submission"). The Supplemental Submission also included a Complaint against Broyhill ("Complaint"). Supp. Submission at 3-4.

As described by the Committee, Broyhill was the sole employee of SkyBlue Strategies ("SkyBlue"), a proprietorship owned and operated by Jamie Hahn.² The Committee engaged SkyBlue in early 2011 to provide campaign management, fundraising, and compliance services.³ Hahn delegated the Committee's bookkeeping and recordkeeping duties to Broyhill, which gave Broyhill access to the Committee's mailbox, telephone, email account, bank account, checkbook, and reporting software.⁴ From February 2011 through March 2013, Broyhill allegedly embezzled approximately \$58,000 from the Committee and concealed his embezzlement by entering in the Committee's records false creditor payments or disbursements to other candidate committees or former contributors.⁵

On April 22, 2013, a few days after the Committee and Hahn discovered Broyhill's embezzlement, Broyhill fatally assaulted Hahn when she confronted Broyhill about his activities.⁶ Broyhill admitted to local law enforcement that he was involved in Hahn's attack, and has been indicted on a first-degree murder charge; he is currently incarcerated and is

² Supp. Submission at 1; Memorandum regarding Oct. 29, 2013 teleconference with Wallace, from Emily M. Meyers, Staff Attorney, FEC, to File at 2 (Oct. 30, 2013) ("Wallace Teleconference").

⁴ Supp. Submission at 1-2.

⁵ The current record indicates that Broyhill disbursed a total of \$57,474 of Committee funds for which the Committee can identify no legitimate campaign-related purpose, and therefore concludes that Broyhill converted those funds to personal use. See Committee's amended quarterly reports, filed with the Commission on July 31, 2013, for each quarter from 2011 through July 2013. This is not inconsistent with the Committee's allegation that Broyhill's embezzlement "resulted in a loss to the Committee in an amount in excess of \$60,000," as the Committee may have suffered additional losses that were not related to Broyhill's personal use of campaign funds. Supp. Submission at 3; Compl. at 1.

⁶ Supp. Submission at 2.

1 undergoing psychiatric evaluation.⁷ We notified Broyhill's court-appointed criminal counsel of
2 the Complaint⁸ but have received no response.

3 Based on the available information, we recommend that the Commission find reason to
4 believe that Broyhill knowingly and willfully violated 2 U.S.C. § 439a(b), and enter into pre-
5 probable cause conciliation with him.

6 II. FACTUAL AND LEGAL ANALYSIS

7 A. Factual Background

8 The Committee retained SkyBlue in early 2011 to perform compliance functions, as well
9 as to conduct fundraising activities and analyze Miller's prospects for reelection following
10 congressional redistricting in North Carolina after the 2010 general election.⁹ Broyhill was
11 responsible for the Committee's bookkeeping and recordkeeping duties, assisted Hahn with
12 Committee fundraising, and prepared draft reports of the Committee's contributions and
13 expenditures.¹⁰ Broyhill was entrusted with access to the Committee's office, check book,
14 reporting software, post office box, and telephone and email accounts.¹¹ Broyhill apparently
15 worked with little supervision.¹² Wallace, the Committee's treasurer, was not involved in the
16 Committee's day-to-day operations, and did not personally review the Committee's bank account

⁷ *Broyhill Indicted in Hahn Murder*, WTVD-TV (May 20, 2013), <http://abclocal.go.com/wtvd/story?section=news/local&id=9109443>; Mechelle Hankerson, *Slain Political Strategist Jamie Hahn Honored with Launch of Foundation*, NEWS & OBSERVER (Oct. 26, 2013), available at <http://www.newsobserver.com/2013/10/26/3314490/building-an-army-of-jamies-local.html>.

⁸ See Letter from Jeff Jordan, Supervisory Attorney, FEC to Joe Arbour, Wake County Public Defender (June 6, 2013).

⁹ Supp. Submission at 1; Wallace Teleconference at 2.

¹⁰ *Id.*

¹¹ Supp. Submission at 1, 2.

¹² Wallace Teleconference at 2.

1 statements.¹³ Rather, he relied upon SkyBlue's representations regarding the Committee's
2 accounts.¹⁴

3 According to Wallace, for each reporting period, SkyBlue would prepare a draft
4 disclosure report and a spreadsheet that appeared to reconcile the Committee's bank account,
5 which included pages from the Committee's bank statements, but not images of the checks made
6 from the Committee's account.¹⁵ Then Wallace would meet with Hahn, Broyhill, or both
7 together, to review activity in the Committee's accounts and the draft disclosure report, and
8 discuss any necessary revisions that SkyBlue should make before filing the report with the
9 Commission.¹⁶ Wallace learned only after Hahn's murder that Broyhill alone reconciled the
10 Committee's accounts and prepared and filed its disclosure reports.¹⁷

11 Rather than accurately maintain and reconcile the Committee's books and records,
12 however, Broyhill apparently issued to himself 39 checks for a total of over \$46,500, and made
13 approximately \$11,000 in 86 other unauthorized disbursements of Committee funds, which he
14 then entered in the Committee's accounting and reporting software as refunds to contributors,
15 contributions to other candidates, or creditor payments.¹⁸ Broyhill's activities led to "widespread

¹³ RAD Communication Log (Apr. 25, 2013), Wallace Teleconference at 2.

¹⁴ Wallace Teleconference at 2.

¹⁵ *Id.*; Supp. Submission at 1.

¹⁶ Wallace Teleconference at 2.

¹⁷ Wallace Teleconference at 2.

¹⁸ See Committee 2012 and 2014 Operating Expenditures, Two-Year Summary, Campaign Finance Disclosure Portal - Candidate and Committee Viewer, *available at* <http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do>; Supp. Submission at 2-3; Compl. at 1.

Following Hahn's murder and Broyhill's arrest, the Committee recovered copies of its bank statements from January 2011 to May 2013, which include images of all checks that cleared the bank, and all credits and debits to the Committee's account. Supp. Submission at 3; Wallace Teleconference at 3. The Committee provided a copy of these records to OGC, and used these records to audit its accounts and file amended disclosure reports with the

1 discrepancies between the disbursements that [Broyhill] reported the Committee making and the
2 actual disbursements made by the Committee[.]”¹⁹ For example, as identified in a Request for
3 Additional Information (“RFAI”) regarding the Committee’s 2012 July Quarterly Report, the
4 Committee reported refunding a total of \$15,900 to five contributors who had originally
5 contributed a total of only \$8,250.²⁰ Furthermore, not only did Broyhill file inaccurate reports
6 with the Commission, but Broyhill neglected to file the Committee’s 2012 Year-End Report.²¹

7 The Committee states that Broyhill’s embezzlement “resulted in a loss to the Committee
8 in an amount in excess of \$60,000.”²² According to Wallace, it is possible that this amount
9 includes some legitimate campaign disbursements and excludes other unauthorized
10 disbursements that Broyhill made in his attempt to conceal his embezzlement.²³ It is also
11 possible, although unlikely, that Broyhill embezzled additional funds, *e.g.*, by intercepting

Commission. Wallace Teleconference at 3; Miscellaneous Report, FEC Form 99 at 1-2 (Aug. 7, 2013) (“August Form 99”).

¹⁹ August Form 99 at 1.

²⁰ See Letter from Chris Jones, Senior Campaign Finance Analyst, FEC to John Wallace, Treasurer, Brad Miller for United States Congress (Oct. 1, 2012). Four of these refunds appear to be an effort to conceal unauthorized campaign expenditures, as the Committee explains that they never cleared the bank account. August Form 99 at 3. One of the refunds was legitimate, as it was endorsed and negotiated by the contributor. *Id.* The Committee never received the RFAI or other Commission correspondence because Broyhill intercepted and concealed the mail sent to the Committee’s post office box. *Id.* at 1; Supp. Submission at 3.

²¹ RAD initiated an administrative fine proceeding (#2698) when the Committee failed to file its 2012 Year-End Report. See Letter from Debbie Chacona, Assistant Staff Dir., FEC to John Wallace, Treasurer, Brad Miller for United States Congress (Feb. 15, 2013). On April 3, 2013, the Commission found reason to believe that the Committee violated 2 U.S.C. § 434(a) for failing to file the 2012 Year-End Report by January 31, 2013. See Letter from Ellen Weintraub, Chair, FEC, to John Wallace, Treasurer, Brad Miller for United States Congress (Apr. 4, 2013). The Committee challenged the imposition of a civil penalty. See Letter from John Wallace, Treasurer, Brad Miller for United States Congress, to Ellen Weintraub, Chair, FEC (May 24, 2013). On October 22, 2013, the Commission dismissed the civil penalty pursuant to 11 C.F.R. § 111.37(b) (providing in relevant part that the Commission may “otherwise terminate” an administrative fine proceeding following its reason-to-believe finding). See Letter from Ellen Weintraub, Chair, FEC, to John Wallace, Treasurer, Brad Miller for United States Congress (Nov. 1, 2013).

²² Compl. at 1; Supp. Submission at 3; *supra* n. 5.

²³ Wallace Teleconference at 3.

1 checks from contributors before the funds reached the Committee's account.²⁴ We have no
2 additional information, however, to parse the purpose of particular disbursements, or identify
3 additional funds that Broyhill may have embezzled. The funds that Broyhill allegedly embezzled
4 do not appear to have resulted in any valuable assets that the Committee could recover, and the
5 Committee has no evidence that Broyhill created hidden bank accounts or made alternative
6 investments with Committee funds.²⁵ Also, the available information includes no indication that
7 Broyhill embezzled cash or deposited Committee funds into his personal bank account.²⁶

8 Although it appears that Broyhill embezzled committee funds as early as February 14,
9 2011, the Committee discovered the embezzlement only in April 2013, after Broyhill failed to
10 revise the draft 2013 April Quarterly Report as Wallace directed.²⁷ Wallace met with Hahn and
11 Broyhill to express his concerns about the inaccuracy of the Committee's disclosure reports and
12 his suspicions of Broyhill's embezzlement.²⁸ Approximately four or five days later, on April 22,
13 2013, Hahn and Broyhill met at Hahn's home, purportedly to discuss Broyhill's embezzlement.
14 It was during that meeting that Broyhill fatally stabbed Hahn.²⁹

15 Broyhill's trial for Hahn's murder has not yet been scheduled. Broyhill has not been
16 charged relating to the embezzlement, but most of the Committee's records, including bank
17 statements, check book, records of accounts payable, and the Committee's laptop computers

²⁴ *Id* at 4.

²⁵ *Id* at 3.

²⁶ *See id.* Wallace stated that local investigators found no evidence that Broyhill had deposited Committee funds into his personal bank account.

²⁷ Supp. Submission at 2.

²⁸ *Id.*; Wallace Teleconference at 3.

²⁹ Supp. Submission at 2; Wallace Teleconference at 3.

1 were seized by the local police department pursuant to a search warrant issued in connection
2 with the murder prosecution.³⁰ Based on statements included in that warrant, local news reports
3 speculate that evidence of Broyhill's embezzlement will be used to establish Broyhill's motive
4 for Hahn's murder.³¹

5 We are not aware of any criminal investigation into Broyhill's embezzlement.³²

6 **B. Legal Analysis**

7 The Federal Election Campaign Act of 1971, as amended (the "Act"), identifies six
8 categories of permissible uses of contributions accepted by a federal candidate.³³ These
9 permissible uses of campaign funds include paying "authorized expenditures in connection with
10 the campaign for Federal office of the candidate or individual," "ordinary and necessary
11 expenses incurred in connection with duties of the individual as a holder of Federal office," as
12 well as "any other lawful purpose."³⁴ Contributions accepted by a candidate, however, may not
13 be converted to "personal use" by any person.³⁵ Conversion occurs when funds in a campaign
14 account are "used to fulfill any commitment, obligation, or expense of a person that would exist

³⁰ Supp. Submission at 3.

³¹ See, e.g., *Warrant: Embezzlement Believed to be Motive in Jamie Hahn's Murder*, WNCN (Aug. 22, 2013), available at www.wncn.com/story/23084386/warrant-embezzlement-believed-to-be-behind-jamie-hahns-murder.

³² According to a news article attached to the Supplemental Submission, as of April 24, 2013, Miller stated that he was unaware of any law enforcement inquiry into the campaign finance issues, and that only the Committee was investigating Broyhill's alleged embezzlement. Josh Shaffer, Anne Blythe & Thomas McDonald, *Suspect in Jamie Hahn Stabbing Made Questionable Campaign Reports, Ex-Congressman Says*, NEWS & OBSERVER at 2, Apr. 24, 2013, available at <http://www.newsobserver.com/2013/04/24/2846591/woman-stabbed-in-north-raleigh.html>. We do not know whether local or federal law enforcement has subsequently initiated such an investigation, but Wallace has indicated to us that he has not been contacted by anyone investigating Broyhill's embezzlement. Wallace Teleconference at 4.

³³ 2 U.S.C. § 439a(a); see also 11 C.F.R. § Part 113.

³⁴ 2 U.S.C. § 439a(a)(1), (2), (6); see also 11 C.F.R. § 113.2.

³⁵ 2 U.S.C. § 439a(b)(1); see also 11 C.F.R. § 113.2(e).

1 irrespective of the candidate's campaign or . . . duties as a holder of federal office."³⁶ The Act
2 and Commission regulations set forth a non-exhaustive list of examples that would constitute
3 personal use *per se*, such as mortgage payments, tuition payments, non-campaign-related
4 automobile expenses, and health club dues.³⁷ For items not on this list, the Commission
5 determines on a case-by-case basis whether an expense would fall within the definition of
6 "personal use."³⁸

7 From February 2011 through March 2013, Broyhill allegedly made 125 unauthorized
8 disbursements from Committee funds, including 39 payments to himself, totaling approximately
9 \$58,000. These disbursements were apparently for Broyhill's own personal use and were
10 misreported on the Committee's disclosure reports. Broyhill's unauthorized disbursements range
11 in amount from approximately \$9.00 to \$12,500.00, and, in addition to payments to Broyhill,
12 most disbursements are to restaurants, gas stations, office supply stores, and mobile telephone
13 providers. Because the Committee is unable to identify a legitimate campaign-related purpose
14 for these disbursements, it appears that Broyhill converted approximately \$58,000 for expenses
15 that existed irrespective of Congressman Miller's campaign or official duties in violation of the
16 personal use provision of the Act.

17 The Act prescribes additional penalties for violations that are knowing and willful.³⁹

18 A violation of the Act is knowing and willful if the act was "taken with full knowledge of all the

³⁶ *Id.* § 439a(b)(2); *see also* 11 C.F.R. § 113.1(g).

³⁷ *Id.* § 439a(b)(2)(A)-(I); 11 C.F.R. § 113.1(g).

³⁸ 11 C.F.R. § 113.1(g)(1)(ii).

³⁹ *See* 2 U.S.C. §§ 437g(a)(5)(B) and 437g(d).

1 facts and a recognition that the action is prohibited by law.”⁴⁰ But this standard does not require
2 the Commission to prove that the respondent acted with knowledge of the specific statute or
3 regulation allegedly violated.⁴¹ Instead, it is sufficient to demonstrate that the respondent “acted
4 voluntarily and was aware that his conduct was unlawful.”⁴² This awareness may be shown by
5 circumstantial evidence from which the respondent’s unlawful intent reasonably may be
6 inferred.⁴³ For example, a person’s awareness that an action is prohibited may be inferred from
7 the circumstances, such as the person’s “elaborate scheme for disguising” his actions.⁴⁴

8 Broyhill’s efforts to conceal his unauthorized disbursements by recording them in the
9 Committee’s books and disclosure reports as payments to a creditor, or disbursements to a
10 candidate committee, or contributor refund indicate that Broyhill knew that this conduct was
11 illegal. That Broyhill attacked Hahn when she confronted him about the missing funds and
12 inaccurate bookkeeping further suggests that Broyhill was aware that he broke the law when he
13 made the unauthorized disbursements. Accordingly, we recommend that the Commission find
14 reason to believe that Broyhill knowingly and willfully violated 2 U.S.C. § 439a(b).

⁴⁰ 122 Cong. Rec. 12,197, 12,199 (May 3, 1976).

⁴¹ *United States v. Danielczyk*, 917 F. Supp. 2d 573, 579 (E.D. Va. 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish a violation is willful, government needs to show only that defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated)).

⁴² *Id.* (citing jury instructions in *United States v. Edwards*, No. 11-61 (M.D.N.C. May 18, 2012), *United States v. Acevedo Vila*, No. 08-36 (D.P.R. Mar. 20, 2009), *United States v. Fieger*, No. 07-20414 (E.D. Mich. Jun. 2, 2008), *United States v. Alford*, No. 05-69 (N.D. Fla. Oct. 7, 2005)).

⁴³ *Cf. United States v. Hopkins*, 916 F.2d 207, 213 (5th Cir. 1990) (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir. 1989)). *Hopkins* involved a conduit contributions scheme, and the issue before the Fifth Circuit concerned the sufficiency of the evidence supporting the defendants’ convictions for conspiracy and false statements under 18 U.S.C. §§ 371 and 1001.

⁴⁴ *Id.* at 214-15. As the *Hopkins* court noted, “It has long been recognized that ‘efforts at concealment [may] be reasonably explainable only in terms of motivation to evade’ lawful obligations.” *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

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COMMUNICATION


IV. RECOMMENDATIONS


1. Find reason to believe that Jonathan W. Broyhill knowingly and willfully violated 2 U.S.C. § 439a(b);
2. Enter into conciliation with Jonathan W. Broyhill prior to a finding of probable cause to believe;
3. Approve the attached conciliation agreement with Jonathan W. Broyhill;
4. Approve the attached Factual and Legal Analysis; and
5. Approve the appropriate letters.

Date

01/14/14


Daniel A. Petalas
Associate General Counsel for Enforcement


William A. Powers
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